Supreme Court, U.S.
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No.

In the Supreme Court of the United States

STEVEN A. KOZUB AND S.S.A.M., INC.,
a California corporation,
Petitioners,

v.

CITY OF POMONA, a California corporation,
Respondent.

On Petition for a Writ of Certiorari to the California Court of Appeal Second Appellate District, Division Two

PETITION FOR WRIT OF CERTIORARI

ROGER JON DIAMOND, ESQ.
Counsel of Record
2115 MAIN STREET
SANTA MONICA, CA 90405
(310) 399-3259
(310) 392-9029 FAX

Counsel for Petitioners

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Becker Gallagher Legal Publishing, Inc. 800.890.5001

QUESTIONS PRESENTED

1. Does a city violate the First and Fourteenth Amendments to the United States Constitution when it adopts and enforces an adult zoning ordinance that requires an adult cabaret to relocate to the industrial zone and prohibits such businesses in the commercial zones, especially where the industrial zone is occupied by on-going businesses by owners of properties within the industrial zone?

2. Is the decision of the California Court of Appeal, which reversed a state trial court's findings and judgment, that city's adult zoning ordinance was unconstitutional as applied, consistent with this Court's decisions in Young v. American Mini Theater, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) and Renton v. Playtime Theaters, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29, rehg.den. 475 U.S. 1132, 106 S.CT. 1663, 90 l.Ed.2d 205 (1986), that a city must provide an adult business operator (bookstore, theater, cabaret) a reasonable opportunity to open?

PARTIES TO THE PROCEEDINGS

Petitioner: Stephen A. Kozub is the Petitioner and the owner of S.S.A.M., Inc., a California Corporation

Respondent: The City of Pomona is a municipal corporation in the State of California.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

TABLE OF APPENDICES v

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 2

CONSTITUTIONAL ANS STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE WRIT 18

CONCLUSION 24

TABLE OF AUTHORITIES

Faretta v. California, 422 U.S. 806,95 S. Ct. 2525,
45 L. Ed. 2d 562 (1975) 2

Renton v. Playtime Theaters,
475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29,
rehg.den., 475 U.S. 1132, 106 S.Ct. 1663,
90 L. Ed. 2d 205 (1986) . . . . . *passim*

Topanga Press, Inc. v. City of Los Angeles,
989 F.2d 1524 (9th Cir 1993) 14, 17, 18

Walnut Properties, Inc. v. City of Whittier,
861 F.2d 1102 (9th Cir . 1988) 11

Young v. American Mini Theater,
427 U.S. 50, 96 S. Ct. 2440,
49 L. Ed. 2d 310 (1976) 15, 17, 19, 20

STATE CASES

City of National City v. Wiener,
3 Cal. 4th 832 (1992) 13

Cook County v. Renaissance Arcade and Bookstore,
122 Ill. 2d 123, 522 N.E.2d 73 (Ill. 1988) 18

Reichardt v. Hoffman,
52 Cal. App. 4th 754 (1997) 10

Town of Islip v. Caviglia,
73 N.Y.2d 544, 540 N.E.2d 215 (N.Y. 1989) 18

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. I 2

U.S. Const. amend. XIV, Sec. 1 2

28 U.S.C. § 1257(a) 2

CITY CODE AND ORDINANCES

Pomona City Code Section .410 3

Pomona City Code Section .420 4

Pomona Ordinance No. 1466 Section .5809(c) 3

Pomona Ordinance No. 1466 Section .5809(d) 3

TABLE OF APPENDICES

APPENDIX A:
Court of Appeal Unpublished Decision 1a

APPENDIX B:
Superior Court Judgment Granting Injunction 11a

APPENDIX C
Superior Court Report of Referee &
Proposed Order 13a

APPENDIX D
Court of Appeal Petition for Rehearing Denied . . . 23a

APPENDIX E
Supreme Court Unpublished Order 24a

PETITION FOR WRIT OF CERTIORARI

Petitioners Stephen A. Kozub and S.S.A.M., Inc, a California corporation ("Kozub") respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the California Court of Appeal, Second Appellate District, Division Two, entered on June 2, 2005. The California Supreme Court denied discretionary review on August 24, 2005.

OPINIONS BELOW

The unpublished opinion (June 2, 2005) of the California Court of Appeal, Second Appellate District, Division Two, is not reported. It is Appendix A at 1a-10a. The Superior Court of the State of California for the County of Los Angeles issued a permanent injunction in favor of Petitioners against Respondent City of Pomona on February 4, 2004. The injunction is not reported. It is Appendix B at 11a-12a.

The injunction issued by the trial court (Appendix B) was based upon a report submitted on January 20, 2004 by a retired state appellate justice who conducted an evidentiary hearing and inspected each site. The report, unpublished, is Appendix C at 13a-22a.

On June 10, 2005 the California Court of Appeal, Second Appellate District, Division Two, denied without opinion the Petition for Rehearing (Appendix D at 23a).

The California Supreme Court on August 24, 2005 denied discretionary review in an unpublished order, Appendix E at 24a.

STATEMENT OF JURISDICTION

The California Court of Appeal, Second Appellate District, Division Two, issued its Opinion on June 2, 2005. On June 15, 2005 Petitioners filed a timely Petition for Rehearing, which the Court of Appeal, Second Appellate District, Division Two, summarily denied without explanation on June 20, 2005.

On August 24, 2005 the California Supreme Court denied discretionary review. This Petition for a Writ of Certiorari is filed within 90 days of the denial of the Petition for Review. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(a). See Rule 13(1) of the Supreme Court Rules. See also Faretta v. California, 422 U.S. 806, 45 L.Ed.2d 562, 95 S.Ct. 2525 (1975), where this Court reversed an unpublished decision of the California Court of Appeal, Second Appellate District after the California Supreme Court denied discretionary review.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. I

> Congress shall make no law . . . abridging the freedom of speech . . . .

U.S. Const. amend XIV, sec.1

> . . . No state . . . shall deprive any person of life, liberty, or property, without due process of law. . . .

Pomona Ordinance No. 1466, Section .5809-5(c)

"Adult-Oriented Business shall be established or permitted in the City's M-1 (Light Industrial) and M-2 (General Industrial) zones."

Pomona Ordinance 1466, Section .5809-5(d)

"1. No Adult-Oriented Business shall be established or located within certain distances of certain specified land uses or zones as set forth below:

a. within 750 feet of any other Adult-Oriented Business in the city adjacent city or shopping center property line; or

b. within 1,000 feet from any existing residentially zoned property or sensitive use in the city or cities adjacent to the city. . . ."

Pomona City Code Section .410

"The light industrial district ("M-1") is intended to provide for the development of industrial uses which include fabrication, manufacturing, assembly or processing of materials that are in a processed form and which do not in their maintenance, assembly, manufacture or plant operation create smoke, gas, odor, dust, sound, vibration, soot or lighting to any degree which might be termed obnoxious or offensive to persons residing in or conducting business in either this or any other zoning district of the city. . . ."

Pomona City Code Section.420

"The 'M-2' general industrial district is intended to provide for the establishment of certain industrial uses considered by the council to be essential to the development of a balanced economic base for the city...."

STATEMENT OF THE CASE

Petitioners have operated their "Baby Dolls Theater," an adult cabaret, in the City of Pomona, since 1998 (Slip Opinion, p. 2). In the year 2002, the City of Pomona revised its Municipal Code and restricted the location of adult businesses. Adult businesses must be at least 1,000 feet from sensitive uses such as residences, churches, schools, parks, and daycare facilities. Also adult businesses may not be operated within 750 feet of other adult businesses. Furthermore, adult businesses are restricted to the "light or general industrial zones." (Slip Opinion, p. 3; Appendix A at 3a).

Petitioners sued the City to enjoin it from enforcing its adult zoning ordinance on the ground that Petitioners could not relocate to the light or general industrial zones because there are too few, if any, properties available for such a business.

As the Court of Appeal acknowledged at page 3 of its Slip Opinion, the trial court appointed a referee to resolve "whether under the City's present adult zoning ordinance, the City allows for the establishment of a reasonable amount of alternative adult use relocation sites." (Slip Opinion, p. 3; App. A). As the Court of Appeal noted, the referee was to consider evidence "to determine the availability of 31

alternative sites identified by Pomona." (Slip Opinion, p. 3; App.A).

The hearing was conducted by Robert E. Feinerman, a retired Justice of the State Court of Appeal. For convenience Petitioners will be referred to as "Kozub," since Steven A. Kozub, one of the Petitioners, was the name used in the courts below.

Justice Feinerman literally examined each property claimed by the City to be available. Feinerman "conducted a parcel-by-parcel examination of prospective sites identified by Pomona as being suitable for an adult business. . . ." (Slip Opinion, p. 4; App.A).

Justice Feinerman "rejected each site." (Slip Opinion, p. 4; App. A). Given his conclusion that no site was available, Justice Feinerman ". . . concluded that Kozub had carried his burden of establishing that Pomona lacks a reasonable amount of adult use relocation sites." (Slip Opinion, p. 4; App. A). Because Justice Feinerman concluded that none of the sites was available he did not follow up by determining how many adult businesses could operate simultaneously in the City of Pomona given the 750 foot restriction imposed by the ordinance with respect to two adult businesses. On February 4, 2004 the Superior Court adopted the recommendation of Justice Feinerman and issued a permanent injunction prohibiting the City of Pomona from enforcing its current adult zoning ordinance against Kozub (Clerk's Transcript ("CT"), pp. 365-366).

Kozub had alleged in his Third Amended Complaint that he had been operating his Baby Dolls adult cabaret theater at 2005 West Holt Avenue in the City of Pomona since June of 1998 and had alleged that the City of Pomona was threatening

to close his adult cabaret theater because it did not conform to the current zoning requirements of Ordinance No. 3873. Kozub alleged in his Third Amended Complaint that the ordinance did ". . . not provide for sufficient properties for adult theaters and adult businesses in the City of Pomona. . . ."[1] Kozub alleged in paragraph 31 of his Third Amended Complaint:

> "Ordinance No. 3873 violates the First and Fourteenth Amendments to the United States Constitution and Article I, Section 2 of the California Constitution in that there are insufficient numbers of properties available. Ordinance No. 3873 does not provide anyone, including Plaintiffs, with a reasonable opportunity to open and operate an adult cabaret in the City of Pomona. . . ." (CT 237)

Pursuant to the stipulation of the parties and a court order, the Superior Court appointed retired Court of Appeal Justice Robert E. Feinerman to conduct an evidentiary hearing to determine the existence of alternative adult use relocation sites. The order appointing the referee provided as follows:

> "The City alleges that there are 31 alternative adult use relocation sites which are available for adult business uses. Plaintiff alleges that there are no alternative adult use relocation sites within the adult use zones.

---

[1] Pomona Ordinance 1466 is the operative zoning ordinance of the City. From time to time it has been amended by various ordinances, including Ordinance No. 3873, which was later modified by Ordinance No. 3962.

> The referee is to take testimony, hear evidence, and decide the question of the availability of the 31 sites within the adult zones." (CT 275)

The order appointing the referee, which was drafted by the City Attorney, stated at the end:

> " . . . The remaining trial issues are currently set for trial on September 30, 2003, 9:00 A.M. in Department 31 . . . ." (CT 276-277).

At the hearing before Referee Feinerman, the City of Pomona reduced the number of sites it contended were available and those sites became the subject of the hearing before the referee.

After conducting an evidentiary hearing and personally viewing all of the sites alleged to be available by the City, Referee Feinerman concluded that no sites were available (CT 341-349).

In light of his conclusion that no sites were available, it obviously became impossible to determine how many adult businesses could operate simultaneously in the City given the 750 foot distance restriction between such businesses imposed by the Pomona Municipal Code. By definition if there are no sites there could be no adult businesses operating simultaneously 750 feet apart from each other.

Given Feinerman's conclusion nothing remained to be tried. Accordingly, the Superior Court rendered judgment for Kozub (CT 361).

In the City's Opening Brief filed with the Court of Appeal the City conceded that if Justice Feinerman was wrong as to the availability of sites the Court of Appeal was to remand the matter for further proceedings. Specifically, the City made the following acknowledgment at page 2 of its Opening Brief filed with the Court of Appeal:

> "Because the Referee never considered the sufficiency of potentially available sites, should this court determine that even a single site was part of the actual business real estate market, the case must be remanded for further proceedings to resolve this factual dispute." (Appellant's Opening Brief, p.2).

At page 24 of the City's Opening Brief filed with the Court of Appeal the City expanded upon its acknowledgment at page 2 that the Court of Appeal would have to remand for further proceedings. Specifically, the City stated at page 24 of its Opening Brief:

> ". . . The Referee's Report does not make any findings or provide any indication that a single site proffered by the City was deemed part of the actual business real estate market.
>
> Had such a finding been made, the Referee would have been required to determine the sufficiency of the relocation sites within the local market by considering a variety of factors, 'including the percentage of land theoretically available to adult businesses, the number of sites potentially available in relation to the population of the city, the number of sites compared with the existing number of adult businesses, or the number of businesses desiring to offer adult entertainment.' . . . ." (Emphasis in original)

The City of Pomona then continued at page 24 and the top of page 25 of its Opening Brief to state that there was nothing within the Referee's Report to indicate that such an analysis was carried out. The City of Pomona also indicated in its Opening Brief at the bottom of page 24 and the top of page 25 that there was no evidence in the record as to the sufficiency of relocation sites. The City then concluded its remark on this point by stating that if the Court of Appeal determined that there was a site that was part of the relevant real estate market ". . . the case must be remanded for further proceedings to resolve the factual dispute relating to the sufficiency of available sites within the city. . . ." (Emphasis added)

The City also stated at page 26 of its Opening Brief that the City had tendered 26 sites for possible relocation, not 31 as originally indicated (Opening Brief , p. 26). In its conclusion, the City requested that the Court of Appeal reverse the judgment and ". . . remand this matter to the Superior Court with an order to conduct further proceedings to resolve the factual dispute relating to the sufficiency of available sites within the City." (City Opening Brief, p. 29).

In response to the City's concession that the matter would have to be remanded on the issue of sufficiency of sites, Kozub responded in his Brief at page 19 that there would be a requirement for a remand if the Court of Appeal should reverse on the issue of alternative sites. Kozub stated in his Respondent's Brief as follows:

> "Kozub clearly argued below that if, in fact, the City properly construed its own code, which it did not, the code would then be unconstitutional in that it did not provide for sufficient areas for adult theaters in violation of certain cases."

Kozub continued,

> ". . . Thus, the most the City can hope to get by this appeal is a remand to the Superior Court with instructions to hold a trial on the alternative argument made below – the City failed to provide sufficient areas for adult uses. . . ."

Finally, in his Conclusion, Kozub stated,

> " . . . If this Court is inclined to reverse the judgment below, then the case should be remanded for trial and the status quo should remain. . . ." (Respondents' Brief, p.20).

In its Reply Brief, filed with the Court of Appeal, the City did a complete about face and stated to the Court of Appeal that the Court of Appeal could determine the sufficiency numerically of the sites. See p. 17 of the Reply Brief. The City violated well established California law that new matters may not be raised for the first time in an appellant's reply brief. Reichardt v. Hoffman, 52 Cal.App. 4th 754, 763-766 (1997). Here the City reversed its earlier position stated in its Opening Brief filed with the Court of Appeal. As a result the Court of Appeal did not have the benefit of adequate briefing on the issue and misread Young v. City of Simi Valley, 216 F.3d 807 (9th Cit. 2000). The Court of Appeal mistakenly stated at the top of page 8 of its Slip Opinion regarding numerical sufficiency of adult sites,

> ". . . In another local case, the existence of only four available sites in Simi Valley was held to be sufficient to establish reasonable alternative avenues of expression under Renton. (Young v. City of Simi Valley (9th Cir. 2000) 216 F.3d 807, 822-823.)"

The Court of Appeal unfortunately misquoted the Ninth Circuit's decision in Young v. City of Simi Valley. In Young v. City of Simi Valley, the District Court had ruled that the number of sites was insufficient as a matter of law. In reversing on the issue of whether there were a sufficient number of sites as a matter of law the Ninth Circuit Court of Appeal clearly focused on the number of sites that could be used **simultaneously** for adult business. The Ninth Circuit stated at pp. 822-823:

> "Given the history of scant demand, and the lack of evidence that others wish to open an adult business in Simi Valley, we cannot say, on this record, that four, simultaneously available sites are insufficient, as a matter of law, to provide reasonable alternative avenues of expression under Renton." (Emphasis added)

The Ninth Circuit appended a footnote to the quotation above. The footnote reads as follows at the bottom of page 823:

> "This is not to say that four simultaneously available sites would not be inadequate in the future when circumstances may be different. That case, however, is not before us today." (Emphasis added)

The reason the Ninth Circuit used the word "simultaneously" is that all of the cases on this subject required the determination as to the numerical availability of sites for adult business operating simultaneously given the 750 foot distance restriction. That is the teaching and holding of the Ninth Circuit in Walnut Properties, Inc. v. City of Whittier, 861 F.2d 1102 (9th Cir . 1988). In other words, the appellate court decisions on this point all deal with numerical

sufficiency of adult businesses operating simultaneously in the City. The issue is how many total adult businesses can the City allow at any one time. The Court of Appeal totally misquoted and mischaracterized Young v. City of Simi Valley when it referred to "the existence of only four available sites in Simi Valley. . . ."

The District Court had concluded in Young v. City of Simi Valley, 977 F.Supp. 1017 (C.D. Cal. 1997) that four adult businesses operating simultaneously in the City of Simi Valley, given the distance restriction between such businesses, were insufficient as a matter of law. The Ninth Circuit reversed on this point, ruling that four simultaneously operating adult businesses were not, as a matter of law, insufficient. The Ninth Circuit remanded the matter to determine whether or not if there were four adult business operating simultaneously in the City would that be sufficient factually. That was one matter for the trial court to resolve.

The opinion of the Court of Appeal is doubly wrong because not only did it fail to recognize that the number four in Young v. City of Simi Valley referred to four simultaneously operating adult businesses in the City, but that in any event it was up to the trial court to make these determinations – both as to the number of sites that could allow for the simultaneous operation of adult businesses as well as whether that number is constitutionally sufficient. On both grounds the Court of Appeal erred in its opinion.

Not only did the Court of Appeal not consider the 750 foot distance restriction between adult businesses mandated by the Pomona Municipal code, which is constitutionally required of any court to do, the Court of Appeal also failed to remand the matter to the trial court to let the trial court make that

determination. As stated initially, even the City made the request in its Opening Brief that the matter be remanded.

It is fundamentally unfair for a state judicial system to deprive the plaintiff of the opportunity of establishing a constitutional fact. Kozub could not do that in the trial court given the ruling of Justice Feinerman, which was that there were no sites available. Thus, Kozub never had the opportunity to present evidence as to the maximum total number of sites that could simultaneously allow adult business to operate nor was there any opportunity to allow evidence as to how many would be required under the First Amendment.

The Court of Appeal assumed that there were at least two sites which were disqualified and therefore 15 remained. The record is crystal clear that 10 sites were at the same location. The Court of Appeal misread the California Supreme Court's decision in City of National City v. Wiener, 3 Cal.4th 832 (1992). The Court of Appeal stated that the California Supreme Court in the City of National City v. Wiener case said there were only three available sites. The Court of Appeal ignored the fact that the City of National City made "... available the entire commercially zoned area of the city, or 572 acres of land, on which to locate an adult business. . . ." 3 Cal.4th at 847. The California Supreme Court noted that existing adult businesses were grandfathered in and that adult businesses could operate in any shopping center. The City of National City comprised only 8.65 square miles, a much smaller city than Pomona, which consists of 22.85 square miles. Also, the City of Pomona has a population almost three times the size of the City of National City.

With respect to each of the properties examined by Justice Feinerman, the Court of Appeal below erroneously believed that properties with industrial businesses were "commercial" and therefore available for anyone. By way of example, the Court of Appeal was apparently of the opinion that the site at 599 East End (site number 36) is available for a commercial enterprise. The undisputed evidence was that a metal fabricating firm, Lumar Metals, has been operating there since 1982. The owner testified that it is an on-going business and the owner has no plans to sell or lease the property.

The Court of Appeal totally ignored footnote 5 of the Ninth Circuit decision in Topanga Press, where the Ninth Circuit stated,

> "We do not answer the question of whether, under Renton, a business has been afforded a reasonable opportunity to relocate if all relocation sites are within an industrial zone and no commercial zones are offered; in this case the City has offered both commercial and non-commercial relocation sites." (Emphasis added)

The City requested the Court of Appeal to publish its opinion. In its request for publication, the City of Pomona conceded that the Court of Appeal had gone beyond what other courts had done with respect to cases involving city ordinances where only industrial zoned properties were available for adult businesses. The City conceded in its request for publication, conveniently filed after the Court of Appeal denied the Rehearing Petition, that the Court of Appeal had essentially answered the question left open by footnote 5 – that a city could constitutionally restrict adult businesses to industrial zoned properties only.

The Court of Appeal denied Petitioners' Petition for Rehearing and the California Supreme Court denied their Petition for Review without opinion.

REASONS FOR GRANTING THE WRIT

This Court's decision in Renton v. Playtime Theaters, Inc., 475 U.S. 41, 89 L.Ed.2d 29, 106 S.Ct. 927 (1986), authored by the late Chief Justice (then Associate Justice Rehnquist), left open some important issues for later resolution, and now is the time to reach them. The lower federal and state courts are grappling with the issues and consuming enormous judicial resources. It is time for this Court to step in and provide some clarity.

The Renton case was designed to fill in some gaps left open by this Court in its earlier opinion in Young v. American Mini Theaters, Inc., 427 U.S. 60, 49 L.Ed.2d 310, 96 S.Ct. 2440 (1976), a plurality opinion which upheld the facial validity of a Detroit adult zoning ordinance that restricted adult businesses protected by the First Amendment to certain zones of the city and which imposed other restrictions. The plurality (by Justice Stevens) recognized the limited issue before this Court (the facial validity of the ordinance) and stated,

> "The ordinances are not challenged on the ground that they impose a limit on the total number of adult theaters which may operate in the city of Detroit. There is no claim that distributors or exhibitors of adult films are denied access to the market or, conversely, that the viewing public is unable to satisfy its appetite to sexually explicit fare. Viewed as an entity, the market for this commodity is essentially unrestrained." 427 U.S. at 62, 49 L.Ed.2d at 321.

At the end of the plurality opinion, Justice Stevens wrote,

> "The situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to lawful speech. . . ." (footnote 35).

Justice Stevens then continued in footnote 35 to quote the District Court's decision:

> "There are myriad locations in the City of Detroit which must be over 1000 feet from existing regulated establishments. This burden on First Amendment rights is slight."

Ten years later this Court was presented with the Renton, Washington ordinance that the District Court upheld against an "as applied" challenge by an adult theater which contended that there was not enough area available for adult theaters. The District Court had upheld the challenged ordinance and this Court upheld the District Court's decision because the ordinance left ". . . some 520 acres, or more than five percent of the entire land area of Renton, open to use as adult theater sites. . . ." Renton, 475 U.S. at 53.

Furthermore, the District Court in Renton found that the 520 acres of land consisted of "[a]ample, accessible real estate," including "acreage in all stages of development from raw land to developed, industrial, warehouse, office, and shopping space that is criss-crossed by freeways, highways, and roads. . . ." Renton, 475 U.S. at 53.

The District Court did not find that no sites were available. This Court referred to the allegation that ". . . in general there are no 'commercially viable' adult theater sites"

and responded that cities were not required ". . . to ensure that adult theaters, or any other kinds of speech - related businesses . . . will be able to obtain sites at bargain prices. . . ." Id. at 54.

This now brings us to the City of Pomona (Respondent herein) which has restricted adult theaters to a tiny portion of the M-1 and M-2 (industrial zones) which are occupied for the most part by long existing, owner occupied manufacturing plants. The question is whether the lower courts in sustaining these types of overly restrictive ordinances, have gone far beyond what this Court in Young v. American Minit Theaters ever contemplated. There are not a "myriad" of locations in Pomona, nor is five percent of the land available.

Justice Rehnquist never said that a city would be within its authority if it restricted adult businesses to a few industrial properties in the M-1 and M-2 zones, especially properties with on-going industrial activities by long term tenants and owner/occupiers.

There have been very few cases which have even discussed the subject of restricting adult businesses to industrial zones only. In Topanga Press, Inc. v. City of Los Angeles, 989 F.2d 1524 (9th Cir 1993), cert.den. 511 U.S. 1030, 128 L.Ed.2d 190, 114 S.Ct. 1537 (1994), the Ninth Circuit mentioned the issue in footnote 5, where it stated at page 1531,

> "We need not answer the question of whether, under Renton, a business has been afforded a reasonable opportunity to relocate if all relocation sites are within an industrial zone and no commercial zones are offered; in this case, the city has offered both commercial and non-commercial relocation sites."

There have been two state court decisions that mentioned industrial zones for adult businesses but did not definitively answer the question which the Ninth Circuit raised in footnote 5 in the Topanga Press case.

First, in Cook County v. Renaissance Arcade and Bookstore, 122 Ill. 2d 123, 522 N.E. 2d 73 (Ill. 1988), appeal dismissed sub nom. Mannheim Books, Inc. v. County of Cook, 488 U.S. 882, 102 L.Ed.2d 201, 109 S.Ct. 209 (1988), the Supreme Court of Illinois considered the constitutionality of an adult use ordinance for unincorporated Cook County. Relying upon this Court's decision in Renton v. Playtime Theaters, the Illinois Court held that it was satisfactory for the ordinance to restrict adult businesses to the industrial zoned areas because there were 78 such areas which contained numerous available sites. It should be noted that the ordinance in question in the Illinois case allowed adult uses to locate freely in the permitted industrial zones whereas the Pomona ordinance has the further limitation regarding proximity to other adult businesses and to certain sensitive uses.

Likewise, the Court of Appeals of New York in Town of Islip v. Caviglia, 73 N.Y. 2d 544, 540 N.E. 2d 215 (N.Y. 1989) upheld an adult zoning ordinance based on Renton v. Playtime Theaters. Again, however, as with the Illinois case, the town was very large and had over 6,000 acres of land zoned industrial. The New York case is really not on point because the parties stipulated to facts establishing that there was ample space available for adult uses in the industrial zones. The New York Court of Appeal stated, 540 N.E. 2d at 223,

> ". . . Significantly, the stipulated facts demonstrate that there remains ample space available for adult uses

> after the rezoning and it is neither claimed nor established that if the ordinance is enforced the total number of adult bookstores will decline or that fewer potential customers will be able to conveniently patronize them."

Thus, we have courts from New York, Illinois, and California, attempting to interpret what this Court meant in Renton v. Playtime Theaters. Could this Court have intended in Renton v. Playtime Theaters to reduce the scope of the holding in Young v. American Mini Theaters? Lower courts have been grappling with this question, but obviously only this Court can shed light on this mystery. From the myriad locations of Detroit (Young v. American Mini Theaters), we have come to a handful of occupied properties in industrial zones only. Is this what this Honorable Court intended in Renton v. Playtime Theaters?

It does appear from the litigation in this area that this Court believes the decision and finding of the trial court is to be given great weight. Here, in contrast, the California Court of Appeal reversed the trial court's findings on what are essentially fact issues. This Court should give guidance in this area to allow the appellate courts to know whether they should defer to trial court findings or whether they should second guess the trial courts. Moreover, review by this Court would shed some light on the question as to whether it is incumbent upon the trial court to make findings with respect to the demand for adult theaters to determine the number of sites that must be made available. This determination was not made by the trial court and the California Court of Appeal refused to remand the case for that determination.

CONCLUSION

For the foregoing reasons, certiorari should be granted to allow this Court to decide whether lower courts have misconstrued this Court's decisions in Young v. American Mini Theaters, supra and Renton v. Playtime Theaters, supra.

Respectfully Submitted,

ROGER JON DIAMOND
Counsel of Record
2115 Main Street
Santa Monica, CA 90405
(310) 399-3259

Attorney for Petitioners

APPENDIX A

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION TWO

B174501

[Filed June 2, 2005]

STEPHEN A. KOZUB et al.,
Plaintiffs and Respondents,

v.

CITY OF POMONA,
Defendant and Appellant.

APPEAL from a judgment of the Superior Court
of Los Angeles County
No. BS046907
Andria K. Richey, Judge

JUDGES: BOREN, P. J.; DOI TODD, J., NOTT, J.*

* Retired Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

OPINION

Cabaret owners Stephen Kozub and S.S.A.M., Inc. (collectively, Kozub) brought a petition for a writ of mandate against the City of Pomona, opposing the city's efforts to shut down "Baby Dolls Theater," a striptease dancing venue that Kozub has operated on a one-half acre parcel in Pomona since 1998. Kozub alleges that the city's zoning scheme makes it virtually impossible to operate an adult theater in Pomona, in violation of his constitutional rights. Kozub asserts that he will suffer irreparable harm if the city carries out its threat to shut down his business, because there are no relocation sites for Baby Dolls Theater within Pomona.

Based on the findings of a referee, the trial court found that enforcement of Pomona's zoning requirements for adult businesses would violate Kozub's constitutional rights. The court permanently enjoined Pomona from enforcing its zoning restrictions against Kozub. We reverse because the referee and the trial court applied an incorrect legal standard. Applying the correct standards set forth by the federal and state courts, we conclude that Pomona is entitled to enforce its zoning ordinance against Kozub.

FACTS

The Prior Appeal

There was a prior appeal in this case, *Kozub v. City of Pomona* (B118294), that was resolved in December 1998 (*Kozub I*). In *Kozub I*, this Court analyzed language used in Pomona's adult entertainment zoning ordinance, and interpreted it to mean that the property line of an adult entertainment facility could not be located within 300 feet of

a residential zone. Kozub's property line was, in fact, within 300 feet of a residence, in violation of the ordinance.

While finding that the location of Kozub's adult entertainment venue violated Pomona's ordinance, we concluded that the constitutionality of the ordinance needed to be addressed. The First Amendment affords protection to adult erotic matter. As we observed in *Kozub I*, the government may place reasonable restrictions on adult entertainment by adopting zoning ordinances, so long as some avenues of communication remain available. We remanded the case to the trial court to resolve a factual dispute relating to the adequacy or inadequacy of land available for adult entertainment facilities within Pomona city limits.

Alterations To Pomona's Zoning Laws

At the time of Kozub's original petition for a writ of mandate, in 1997, Pomona municipal law stated that "adult entertainment facilities shall not be located within 300 feet of the boundary of a residential zoning district."

In 1998, while Kozub's petition was pending, the city amended its law to restrict adult businesses to light or general industrial zones, with the further restriction that the adult business be at least 750 feet from any other adult business and at least 1,250 feet from "sensitive uses" such as residences, churches, schools, parks, and daycare facilities. In 2002, Pomona again revised its municipal code. The new ordinance reduces the buffer zone for sensitive uses to 1,000 feet.

The Referral And The Hearing

The trial court found that the constitutional and factual issues presented by the case would require inordinate amounts

of judicial time. The court appointed a referee to resolve "whether under the City's present adult zoning ordinance, the City allows for the establishment of a reasonable amount of alternative adult use relocation sites." Specifically, the referee was to consider evidence to determine the availability of 31 alternative sites identified by Pomona.

The hearing was conducted by Robert Feinerman, a retired justice of the Court of Appeal, acting as the court-appointed referee. The referee posed two questions. First, he inquired whether the adult use sites identified by Pomona may be considered part of the actual business real estate market. Second, he determined whether, after excluding sites that cannot be properly considered part of the real estate market, there are an adequate number of potential relocation sites for an existing adult business. He deemed the "litmus test" to be "whether or not, given the totality of the evidence, [a] site would not reasonably become available for the adult business."

The referee listed the requirements imposed by Pomona on adult businesses. City regulations require a minimum 3,000-square-foot floor space for an adult cabaret, plus additional development standards relating to parking, health and safety. City law prohibits adult businesses from being operated within 750 feet of another adult business, or 1,000 feet from a sensitive use.

The referee conducted a parcel-by-parcel examination of prospective sites identified by Pomona as being suitable for an adult business. He rejected each site. The referee's reasons for rejecting the sites included the following: (1) the site was currently under lease or occupied by owners who did not presently intend to lease the property; (2) the parking was inadequate; (3) the building at the site was too large, though

it could be divided into smaller spaces; (4) the site was within 1,000 feet of a church or temple; (5) the site was too small or irregularly shaped; (6) the site was within 1,250 feet of residences; or (7) restrictive private covenants would probably prohibit the establishment of an adult-oriented business. Given the totality of the evidence, the referee concluded that Kozub had carried his burden of establishing that Pomona lacks a reasonable amount of adult use relocation sites.

Judgment Is Entered For Kozub

Over Pomona's objections, the trial court approved the report and recommendation of the referee. The court found that enforcement of the Pomona Municipal Code ordinances against Kozub would violate his First and Fourteenth Amendment rights. A judgment was entered permanently enjoining the city from enforcing its current zoning ordinance against Kozub.

DISCUSSION

The First Amendment protects adult entertainment that has arguably artistic value, including erotic dancing. (*Young* v. *American Mini Theatres* (1976) 427 U.S. 50, 70, 49 L. Ed. 2d 310 (*Young*); *Morris v. Municipal Court* (1982) 32 Cal.3d 553, 566-568, 186 Cal. Rptr. 494.) The government may place reasonable restrictions on the number and location of adult entertainment venues by adopting zoning ordinances that impose minimum distance requirements on such establishments. (*Young, supra,* 427 U.S. at pp. 52, 71-73 [city could reasonably require that an adult theater not be located within 500 feet of a residential area or within 1,000 feet of two other adult theaters].) This type of zoning ordinance is analyzed as a time, place and manner regulation.

(*Renton* v. *Playtime Theatres, Inc.* (1986) 475 U.S. 41, 46, 89 L. Ed. 2d 29 (*Renton*).) The appropriate inquiry is whether the ordinance "is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication." (*Id.* at p. 50; *Schad* v. *Mount Ephraim* (1981) 452 U.S. 61, 75-76, 68 L. Ed. 2d 671.)

Faced with restrictive zoning regulations, adult business owners--including Kozub- -argue that they have no reasonable alternative avenues of communication because "some of the land in question is already occupied by existing businesses, that 'practically none' of the undeveloped land is currently for sale or lease, and in general there are no 'commercially viable' adult theater sites" within a city. (*Renton, supra,* 475 U.S. at p. 53.) The argument does not fly. "That respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation. . . . [W]e have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices." (*Id.* at p. 54.) The courts are "'not concerned with economic impact'" on the adult business owner. (*Ibid.*)

California courts must apply the "express language" and "underlying rationale" of the *Young* and *Renton* decisions. (*City of National City v. Wiener* (1992) 3 Cal.4th 832, 839 (*National City*).) Quoting *Young* and *Renton,* our Supreme Court noted that "'the First Amendment requires only that [a city] refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city . . . .'" (*National City, supra,* 3 Cal.4th at p. 843.) To adult business owners who contended that "the availability of sites under the ordinance is 'illusory' because

of the lack of sites currently for rent, the unwillingness of owners of available sites to rent to them, and the considerable cost of building their own shopping center in compliance with the ordinance," the court replied that "none of these arguments establish constitutional infirmity." (*Id.* at p. 847.) The court in *National City* was unconcerned that none of the landlords with vacancies at three suitable sites were willing to rent to an adult business owner: "The Constitution does not saddle municipalities with the task of ensuring either the popularity or economic success of adult businesses." (*Id.* at p. 848.) The court observed that the adult business owner had the option of building his own shopping center, though the cost would be prohibitive. (*Id.* at p. 849.)

The referee and the trial court in this case did not follow the legal standards set forth in *Young, Renton* and *National City*. Virtually every purported flaw in the sites analyzed by the referee was constitutionally irrelevant. The primary defect identified by the referee was that many of the potential sites are not currently for rent. The controlling cases emphasize that it is irrelevant whether suitable sites are currently under lease or owner-occupied, for purposes of constitutional review. (*Renton, supra,* 475 U.S. at p. 53; *National City, supra,* 3 Cal.4th at p. 847.)

The referee focused improperly on "economic impact" problems. It is irrelevant that many of the sites are economically unfeasible because they are too large, too small, or poorly shaped. Physical aspects may render sites unavailable for genuine consideration only if they are "under the ocean, airstrips of international airports, sports stadiums, areas not readily accessible to the public, areas developed in a manner unsuitable for any generic commercial business, areas lacking in proper infrastructure, and so on. *However, the fact that a site may not be commercially desirable does not*

render it unavailable. It is not relevant that a relocation site will result in lost profits, higher overhead costs, or even prove commercially unfeasible for an adult business." (*Woodall v. City of El Paso* (5th Cir. 1995) 49 F.3d 1120, 1124, italics added). Accord: *Topanga Press, Inc. v. City of Los Angeles* (9th Cir. 1993) 989 F.2d 1524, 1532.)

None of the sites listed by Pomona are unsuitable for commercial business. In fact, most of them are being used by commercial businesses at the present time. At best, Kozub's complaints about the properties have to do with commercial unfeasibility for *his* business. This is not a relevant consideration. "While it is constitutionally irrelevant whether relocation sites located in industrial or manufacturing zones suit the *particular* needs of an adult business, potential sites must be reasonable relocation sites for some commercial enterprise before they can be considered part of the relevant market." (*Topanga Press, Inc. v. City of Los Angeles, supra,* 989 F.2d at p. 1531. (Underline added.) There is no First Amendment right for adult businesses to be in areas zoned as "commercial" or "retail" instead of an "industrial" zone. (*3570 East Foothill Blvd., Inc. v. City of Pasadena* (C.D.Cal. 1995) 912 F. Supp. 1257, 1262.)

We move to the other disqualifying factors identified by the referee. It is irrelevant that residences were located 1,250 from the proposed sites: the current ordinance only requires a 1,000 foot buffer zone. Furthermore, the existence of restrictive covenants does not make a potential site "unavailable" to the business real estate market. (*Lim v. City of Long Beach* (9th Cir. 2000) 217 F.3d 1050, 1055.) Finally, the adequacy of the parking is not germane. (*3570 East Foothill Blvd., Inc. v. City of Pasadena* (C.D.Cal. 1997) 980 F. Supp. 329, 340.)

The only apparent problem with Pomona's list of sites is that one is within 1,000 feet of a Buddhist Temple, though it was being used as a residence, not for religious services, and a church is operating within 1,000 feet of a second site, though the church lacks a conditional use permit. Assuming that these two sites are disqualified due to proximity to a "sensitive use," there remain at least 15 (and as many as 24) potential sites available to Kozub, after setting aside irrelevant concerns about economic feasibility and ability or willingness to rent.[1]

Under *National City*, 15 potential sites is enough: the Supreme Court was unfazed that the adult business owner in that case had only *three* available choices in the entire city, and not one of the landlords at those locations was willing to rent to him due to the nature of his enterprise. (*National City, supra,* 3 Cal.4th at p. 848. See concurring and dissenting opn. of Mosk, J., at pp. 856-857, noting that the three potential sites were definitively unavailable to the defendant, citing the trial court's comment that the landlords would "'not in a million years'" rent their properties to an adult business.) In another local case, the existence of only four available sites in Simi Valley was held to be sufficient to establish reasonable alternative avenues of expression under *Renton*. (*Young v. City of Simi Valley* (9th Cir. 2000) 216 F.3d 807, 822-823.)

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[1] While the referee indicated that he examined 26 sites proposed by Pomona, only 17 sites are actually referenced in his report. Apparently, the remaining nine sites were all separate buildings located on one of the properties that was improperly rejected by the referee due to restrictive private covenants and existing leaseholds.

In sum, the referee applied an inappropriate litmus test. The question is not whether any particular site is appropriate for an adult business. Rather, the issue is whether there are any sites appropriate for a generic commercial enterprise, regardless of current occupancy, landlords' unwillingness to rent, physical characteristics, or economic unfeasibility. By this standard, Pomona has established that there are numerous sites available within the city, and respondents failed to carry their burden of proving nonavailability of alternative sites.

DISPOSITION

The judgment is reversed. The City of Pomona is entitled to recover its costs on appeal.

/s/_____
BOREN, P. J.

We concur:

/s/_____
DOI TODD, J.

/s/_____
NOTT, J.*

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* Retired Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

APPENDIX B

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

CASE NO BS046907

[Filed February 4, 2004]

STEPHEN A. KOZUB and S.S.A.M., INC., a California Corporation Plaintiffs,	)
v.	)
CITY OF POMONA, a Municipal Corporation, Defendant	)

JUDGMENT GRANTING PERMANENT INJUNCTION

The Court having read and considered the pleadings on file in this case and having approved the Report of Referee and Proposed Order, and GOOD CAUSE APPEARING,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

Defendant City of Pomona, its agents, deputies, and representatives, are hereby permanently enjoined and restrained from enforcing against Plaintiffs the current zoning and locational provisions of the Pomona Municipal Code (including Ordinance Nos. 3873 and 3962) only, which, but for this permanent injunction, would require Plaintiffs to cease operating their adult oriented business (now known as "Baby Dolls") located at 2005 West Holt Avenue in the city of Pomona.

Enforcement of the zoning and locational requirements of the Pomona Municipal Code and applicable ordinances against Plaintiffs would violate Plaintiffs' First and Fourteenth Amendment rights. This judgment is limited to Plaintiffs only and sustains Plaintiffs'' contention than as applied to them the Pomona Municipal Code provisions and ordinances relating to the location of adult businesses violate their First and Fourteenth Amendment rights.

Plaintiffs shall be awarded their costs of suit in the amount of $_____. The court reserves jurisdiction to entertain a motion for attorney's fees pursuant to 42 United States Code Section 1988 and *E.W.A.P., Inc. v. City of Ontario*, 177 Cal. App. 3d 1108 (1980).

/s/_____
HONORABLE ANDREA K. RICHEY,
SUPERIOR COURT JUDGE

APPENDIX C

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

CASE NO BS046907

[Filed January 26, 2004]

STEPHEN A. KOZUB and S.S.A.M., INC., a California Corporation Plaintiffs,	)
v.	)
CITY OF POMONA, a Municipal Corporation, Defendant	)

Judge: Honorable Andrea K. Richey
Dept.: 31

REPORT OF REFEREE & PROPOSED ORDER

Pursuant to the stipulation of the parties, Robert Feinerman, a retired Presiding Justice of the California Court of Appeal and a retired Judge of the Los Angeles Superior Court, was appointed by this Court under Code of Civil Procedure Sections 639(a)(2) and 645.1 as a Referee to make recommendations to the Court concerning the following issue:

Under the City of Pornona's present adult zoning ordinance, does the City allow for the establishment of a reasonable amount of alternative adult use relocation sites? The City alleges that there are 31 alternative adult use relocation sites which are available for adult business use. Plaintiff alleges that there are no alternative adult use relocation sites within the adult use zones.

Hearings were held on July 22, 2003 and September 19, 2003 and testimony was received from numerous witnesses, including the experts designated by the parties. The Referee and counsel for the parties visited the various sites that the City contends are alternative adult use relocation sites.

In determining whether there are suitable alternative sites for locating adult entertainment businesses, the courts have utilized a two step process. The first question is whether relocation sites provided to business may be considered part of the actual business real estate market; the second question is whether, after excluding those sites that may not be properly considered to be part of the relevant real estate market, there are an adequate number of potential relocation sites for an already existing adult business. Property is not potentially available when it is unreasonable to believe that it would ever become available to any commercial enterprise. Areas in manufacturing zones may be included in the actual business real estate market as long as they have proper infrastructures, such as sidewalks, roads and lighting (Topanga Press v. City of Los Angeles, 989 F.2d. 1527; Diamond v. City of Taft, 215 F.3d. 1052). The fact that a site is currently unavailable because of a current use does not necessarily make it unavailable. The litmus test is whether or not, given the totality of the evidence, the site would not reasonably become available for the adult business.

Once the relevant market is defined, a court must ascertain whether the market contains a sufficient number of potential relocation sites for the adult business. Most courts employ one of two methods to determine whether there are a sufficient number of alternative sites: the percentage of land within the city available to adult businesses, or the number of sites compared with the number of adult businesses currently in existence or seeking to open. However, both Federal and California decisions have made it clear that a court's overriding concern in determining whether the market contains a sufficient number of potential relocation sites for an adult business is that a city cannot effectively deny adult businesses a reasonable opportunity to open (or stay open if it is already an operating business) and operate within the city. The touchstone is reasonableness. (See Renton v. Playtime Theatres, Inc., 475 U.S. 41, 54; Walnut Properties, Inc. v. City of Whittier, 861 F.2d. 1102; City of Stanton v. Cox, 207 Cal,App.3d. 1557,1566.)

In the case at bench, the City of Pomona is attempting to require Plaintiffs, who have been operating their adult cabaret/theatre at their existing location since June 1998, to relocate to another location. This is not a case where Plaintiffs are seeking to open a new establishment. The City now contends that there are 26 alternative adult use relocation sites within the City limits. It is the City's position that it is irrelevant that a site may be occupied by an existing business, or a building is under lease, or that a proposed site is too large or to small in area, or not available for an adult business so long as it may reasonably become available in the future for a generic commercial enterprise, including businesses such as a service station, a non-adult book store, or any kind of retail outlet.

It should be noted that the applicable City regulations require a minimum of 3,000 square feet of floor space for an adult cabaret and that there are additional development standards covering parking, health and safety for these establishments. The Municipal Code also prohibits adult businesses from being operated within 750 feet of another adult business.

Having reviewed the testimonial and documentary evidence received in this matter, and having viewed the various sites that are in dispute, and having considered the opening briefs of the parties, the points and authorities cited by the parties, and the closing written arguments of counsel, the Referee has concluded that under the City's present adult zoning ordinance, the City has not allowed for a reasonable amount of alternative adult use relocation sites.

In reaching this conclusion, the Referee has taken into consideration the strict criteria imposed by the Federal and State courts in this area and understands that if a proposed site is already occupied by an existing business or that undeveloped land is currently not for sale, this fact alone is not sufficient to disqualify a proposed alternative site. However, the bottom line is whether or not the City has effectively denied Plaintiffs a reasonable opportunity to relocate and operate within the city. As the Court indicated in Renton, supra, the touchstone is reasonableness. An examination of the 26 sites proposed by the City leads to the inevitable conclusion that the City has not provided a reasonable opportunity to Plaintiffs to relocate and operate their business.

SITE NO. 1 (2200 Pomona Boulevard)

This site consists of 10 individual industrial buildings

between 10,000 to 20,000 square feet that are located on 9.69 acres. All of the buildings are either occupied by owners or under lease. The parking is inadequate at this building and the CC and R's on this property would probably prohibit the establishment of an adult-oriented business on the site.

SITE NO. 2 (2788 Pomona Boulevard)

This site is a 49,000 square foot building on 3 acres that is divided into three units. Prior to October 2002 it would unavailable under Pomona Ordinance 3873 because it was within 1250 feet of land zoned for residences only. (Ordinance 3962 reduced the proximity requirements from 1250 feet to 1000 feet). From a practical standpoint, the building is too large to be used for commercial purposes. Theoretically, it could be divided into more than three units, but it would not be commercially viable to do so and would require discretionary approval by the City.

SITE NO.3 (2882 Pomona Boulevard)

There is a church within 1000 feet of this site. The Pomona Municipal Code bars an adult use within 1000 feet of a church. The church is located at 3209 Producer. The City has argued that the church lacks a conditional use permit, but it has not attempted to interfere with or stop the Church's activities prior to this hearing.

SITE NO. 14 (1396 Grand Avenue)

The owners of this property are operating a family business at this location and have done so for more than 7 years. They have indicated (Mr. Larry Kirby, an owner, testified in this proceeding) that they do not desire to sell or lease the property. There is a Buddhist Temple within 1000

feet of the location that is presently being used as a residence by the members. However, the Temple has applied for a conditional use permit to conduct religious services at the location. As indicated previously, adult use of property is prohibited within 1000 feet of a church.

SITE NO. 15 (1396 Grand Avenue)

This property is 65 feet wide and was disqualified until October 2002 because it was within 1250 feet of a residential area. However, it is not zoned residential. It is a vacant lot consisting of 0.93 acres. Plaintiff contends that it is too small and dysfunctional to be used for an adult cabaret/theatre because of its size and the inability to have parking space sufficient to meet the Code requirements for an adult business. The site could be made available for commercial use, but it is questionable whether it would be suitable for Plaintiffs' business. The owner of the property, Mr. Nick Testa, has submitted a declaration to the Referee (Exhibit 2) in which he declared that he intends to use the property for his own purposes and that the property is not available for lease or sale.

SITE NO. 20 (1450 East Ninth Street)

This site contains four occupied buildings on a 27,600 square foot area. Plaintiffs contend it is too large to be used for their business. Parking to meet the code requirements for an adult enterprise appears to be inadequate.

SITE NO. 22 (1500 East Ninth Street)

This is a 66,000 square foot building on a 1.71 acre site. The building is occupied by Fluke Electronics. It is questionable whether this property could be made available

for commercial use because of the limited parking and the size of the building.

SITE NO. 23 (1501 East Ninth Street)

This is a vacant 6 acre parcel that the City of Pomona has leased from the owner and subleased to Cal Spas, Inc. for 10 years on October 16, 2003. Given the length of the lease, it is the opinion of the Referee that the property is not reasonably available for adult business use.

SITE NO. 24 (1639 East Ninth Street)

This parcel is a construction site occupied by the owner, Fite Corporation, and used by them continuously since 1988. The Company's owner, Mr. Fite, testified that he intends to operate his business at this location in the future and has no other plans for this location. There is residential use within 1250 feet of the property, but this residential use is non-conforming. The existing building on the property has less than 3000 square feet and does not meet the requirements of the City of Pomona for an adult cabaret. The subject lot is irregular in shape. The parties stipulated that as of December 6, 2002 residential use existed within 1250 feet of the site. (This stipulation for the record also covered sites 25,26,27,28,29,36 and 41.

SITE NO. 25 (1651 East Ninth Street)

This site is presently occupied by residences, but it is zoned for industrial use. Given the size of the real property (0.43 acres), and given the parking and space requirements for an adult cabaret, it would appear to be unavailable as a realistic potential site for the Plaintiffs' business. (The City contends it would be suitable for an adult book store because

only 1000 square feet is required for an adult book store and this makes the parcel "available".)

SITE NO. 26 (1659-81 East Ninth Street)

This site consists of three occupied small houses on the property. None of the buildings are sufficient to house an adult cabaret, but they could house an adult book store. For an adult cabaret, the site lacks adequate space for parking and landscaping.

SITE NO. 27 (1695 East Ninth Street)

This 0.6 acre site is used as a pallet storage yard and is within 1250 feet of residences in a non-conforming use area. Plaintiff contends that the lot is too small and irregular shaped to be used for an adult cabaret. Meeting parking and other requirements for such a business would be difficult.

SITE NO. 28 (891 East End Avenue)

This is a vacant lot consisting of 4.70 acres and has been leased by the Boris Trust to the City of Pomona. Plaintiff contends that it is too large and is unavailable because the site is in the City of Pomona Redevelopment Area and it is doubtful whether the Redevelopment Agency of the City would approve commercial development of the area to include an adult use site. No evidence was offered on this issue.

SITE NO. 29 (1602 East 7th Street)

This site is located on the south side of Seventh Street and is east of East End Avenue. It is 0.45 acres in size and contains a very small structure. Most of the site is used for open storage. There is a 25 foot set back for the property on

Seventh Street if there is to be any future development, which would further reduce the available space on the lot. Plaintiffs contend the lot, if the site became available, would be too small and too narrow to relocate their business. The present structure on the property is too small to accommodate most commercial uses. Parking and landscaping would be difficult.

SITE NO. 36 (599 East End)

This site has been utilized by the owner, Betty Robinson, as the base for Lumar Metals, a metal fabrication firm, since 1982. She testified that she has an on-going business and has no plans to sell or lease the property and the property is unavailable.

SITE NO.37 (5757 East End)

This is a 0.66 acre site and has a 9,530 square foot industrial metal building on the location. It is used as an auto repair facility. The site is located within 1250 feet of a church located on East End Avenue, north of Third Street. Prior to the adoption of Ordinance 3962 in 2002, this would have disqualified the property under the old regulations. Plaintiffs contend the lot is too narrow to be used for their business purposes.

SITE NO. 41 (1405-1419 East Mission Boulevard)

This is an existing adult cabaret owned by the Plaintiffs in this case. It was the subject of prior litigation (Advanced Entertainment v. City of Pomona, Los Angeles Superior Court Case No. BC219015). Two clubs of this nature cannot operate on these premises—the lot is too small and to compete against yourself is not commercially viable. To utilize this site, the owners would have to close the existing club and

move the Plaintiffs to this location. By no stretch of the imagination can this be deemed to be reasonable "availability."

In conclusion, given the guidelines delineated by Federal and State appellate courts, and given the totality of the testimonial and documentary evidence received in this case, it is the Referee's Conclusion of Law that the Plaintiffs have sustained their burden of proof by a preponderance of the evidence to establish that on the facts in this case, under the present adult zoning ordinance, the City of Pomona has not allowed for the establishment of a reasonable amount of alternative adult use relocation sites. To conclude otherwise, would be sophistry carried to an extreme.

Dated December 24, 2003

/s/ _____
Robert Feinerman, Referee

APPENDIX D

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION TWO

B174501

[Filed June 20, 2005]

STEPHEN A. KOZUB et al.,	)
	)
v.	)
	)
CITY OF POMONA,	)
	)

THE COURT:

Petition for rehearing is denied.

APPENDIX E

SUPREME COURT OF CALIFORNIA
En Banc

S135332

[Filed August 24, 2005]

STEPHEN A. KOZUB et al.,	)
Plaintiffs and Respondents,	)
	)
v.	)
	)
CITY OF POMONA,	)
Defendant and Appellant.	)
	)

Petition for review DENIED.

The request for an order directing publication of the opinion is denied.

/s/_____
Chief Justice

Supreme Court, U.S.
FILED
DEC 29 2005
OFFICE OF THE CLERK

No. 05-673

In The
Supreme Court of the United States

STEVEN A. KOZUB AND S.S.A.M., INC.,
a California corporation,

Petitioners,

v.

CITY OF POMONA, a California corporation,

Respondent.

On Petition For A Writ Of Certiorari To The California Court Of Appeal Second Appellate District, Division Two

BRIEF IN OPPOSITION

ARNOLD ALVAREZ-GLASMAN,
City Attorney
*ROGER C. COLVIN,
Assistant City Attorney
ALVAREZ-GLASMAN & COLVIN
Attorneys for Respondent, City of Pomona
100 North Barranca Ave., Suite 1050
West Covina, CA 91791
Telephone: (626) 858-9121
Facsimile: (626) 858-2279

December 29, 2005

**Counsel of Record*

CUCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether a city violates the First and Fourteenth Amendments of the United States Constitution when it adopts an adult zoning ordinance that requires an adult strip club to relocate to general or light industrial zones and said industrial zones have numerous relocation sites that allow an adult business owner reasonable opportunity to relocate and operate.

2. Whether the decision of the California Court of Appeal, which held that a city's adult zoning ordinance provided reasonable alternative channels of communication, was consistent with this Court's decision in *Young v. American Mini Theater, Inc.*, 427 U.S. 50, 49 L.Ed.2d 310, 96 S.Ct. 2440 (1976) and *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 89 L.Ed.2d 29, 106 S.Ct. 925 (1986).

TABLE OF CONTENTS

	Page
INTRODUCTION	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	4
I. CERTIORARI SHOULD BE DENIED BECAUSE THE CALIFORNIA COURT OF APPEAL DECISION UPHOLDING POMONA'S ADULT ZONING ORDINANCE IS CONSISTENT WITH THIS COURT'S DECISIONS IN *YOUNG* AND *RENTON*	5
A. The California Court of Appeal's Holding that 24 Potential Relocation Sites Provides Reasonable Alternative Channels of Communication is Proper	6
B. An Adult Zoning Ordinance That Restricts Adult Businesses to Two Different Industrially Zoned Areas is Consistent With *Young* and *Renton*	9
CONCLUSION	12

TABLE OF AUTHORITIES

Page

CASES

3570 East Foothill Blvd., Inc., v. City of Pasadena, 912 F.Supp. 1257 (C.D. Cal. 1995) 9, 10, 12

City of Renton v. Playtime Theatres, Inc., 475 U.S. 31, 89 L.Ed.2d 29, 106 S.Ct. 925 (1986) ..... *passim*

Isbell v. City of San Diego, 258 F.3d 1108 (9th Cir. 2001) 8

Topanga Press, Inc. v. City of Los Angeles, 989 F.2d 1525 (9th Cir. 1993) 7, 10, 11

Town of Islip v. Caviglia, 540 N.E.2d 215 (N.Y. 1989) 10

Young v. American Mini Theatres, Inc., 427 U.S. 50 71, 49 L.Ed.2d 310, 96 S.Ct. 2440 (1976) ... 1, 4, 5, 6, 8, 10

Young v. City of Simi Valley, 216 F.3d 807 (9th Cir. 2000) 7, 8, 9

RULES

Sup. Ct. R. 10 4

INTRODUCTION

"[P]reserve[ing] the quality of urban life is [a governmental interest] that must be accorded high respect." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71, 49 L.Ed.2d 310, 96 S.Ct. 2440 (1976). In order to preserve this substantial government interest for the benefit of its residents, Respondent City of Pomona (the "City"), submits this Brief in Opposition to the Petition for a Writ of Certiorari filed by Petitioners Steven A. Kozub and S.S.A.M., Inc. (Case No. 05-673).

Petitioner asserts that this Court should review the decision in this matter because the California Court of Appeal was incorrect when it concluded that the City adult zoning ordinance provided Petitioner with reasonable alternative avenues of communication where the City provided Petitioner 24 potential relocation sites located in light and general industrially zoned areas for Petitioner's adult striptease dancing venue. Petitioner's case, however, is not persuasive. This Court has previously addressed the issue in the *Young* and *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 31, 89 L.Ed.2d 29, 106 S.Ct. 925 (1986), decisions and provided a clear, workable, and fair test. The Court of Appeal, guided by the legal standards set forth in the above referenced cases, properly held that the City provided Petitioner with a reasonable opportunity to relocate and operate his business within the city wherein it provided 24 potential relocation sites. As such, no compelling reason exists for this Court to re-visit this well settled law.

STATEMENT OF THE CASE

Petitioner is the owner of a striptease dancing venue called "Baby Dolls Theatre," which is one of two adult businesses located in the City. Petitioner has operated and maintained the adult business since 1998 on a one-half acre parcel of land. *Kozub v. City of Pomona*, No. BS046907, slip op. at. 2 (Cal. Ct. App. June 2, 2005). In that year, Petitioner was found in violation of Pomona's adult zoning ordinance which restricted such businesses from locating within 300 feet of residential zones. *Kozub*, slip op. 2-3. While determining that Petitioner violated the City's adult zoning ordinance, the trial court further remanded the case to resolve the adequacy of the City's adult zoning ordinance. *Kozub*, slip op. 3.

In that same year, the City amended its adult zoning ordinance to restrict adult businesses to light or general industrial zones and placed distance restrictions to be at least 750 feet from other adult businesses and at least 1,250 feet from churches, schools, parks, and daycare facilities ("sensitive uses"). In 2002, the City amended the ordinance reducing the distance restriction with respect to sensitive use sites to 1,000 feet. *Kozub*, slip op. 3.

At trial, the court appointed retired Justice Robert Feinerman as referee to determine whether under the City's current adult zoning ordinance, the City allowed a reasonable amount of alternative adult use relocation sites. *Kozub*, slip op. 4. The referee was asked to answer two questions: first, whether the adult use sites the City identified may be considered part of the real estate market; and second, after excluding any sites as not part of the real estate market, whether the remaining potential sites

were an adequate number for an existing adult business. *Kozub*, slip op. 4.

The Referee conducted a site-by-site examination of each of the City's proffered potential relocation sites. Ultimately, the referee rejected every site offered by the City, stating the following reasons as grounds for site disqualification: (1) the site was currently under leases or occupied by owners who did not presently intend to lease the property; (2) the parking was inadequate; (3) the building at the site was too large, though it could be divided into smaller spaces; (4) the site was within 1,000 feet of a church or temple; (5) the site was too small or irregularly shaped; (6) the site was within 1,250 feet of residences; and (7) restrictive covenants would probably restrict the establishment of an adult business on the site. *Kozub*, slip op. 4-5. The referee concluded that the City's adult zoning ordinance did not provide a reasonable amount of adult use relocation sites. *Kozub*, slip op. 5. Subsequently, the City appealed the referee's determination to the California Court of Appeal, Second District.

On appeal, the Court of Appeal reversed the trial courts decision. The Court of Appeal held that the referee and trial court applied the incorrect legal standard and concluded that the City of Pomona was entitled to enforce its zoning ordinance against Petitioner. *Kozub*, slip op. 2. The court determined that the referee improperly disqualified viable, potential relocation sites. "Virtually every purported flaw in the sites analyzed by the referee was constitutionally irrelevant." *Kozub*, slip op. 7. The court concluded that the following factors considered by the referee were constitutionally irrelevant: (a) the fact that some sites were not currently for rent; (b) the economic impact on Petitioner's business due to the site being too

big, too small, or too oddly shaped; and (c) the existence of restrictive covenants on potential sites and the adequacy of parking. *Kozub*, slip op. 7-8. After applying the proper constitutional standards, the Court of Appeal determined that up to 24[1] potential relocation sites remained, from which Petitioner could choose from. *Kozub*, slip op. 9. As such, the Court of Appeal held that "Pomona has established that there are numerous sites available within the city, and [Petitioner] failed to carry their burden of providing nonavailability of alternative sites." *Kozub*, slip op. 10. Petitioner subsequently filed a petition for Rehearing for which the Court of Appeal summarily denied.

On August 24, 2005, the California Supreme Court denied discretionary review.

REASONS FOR DENYING THE WRIT

A petition for a writ of certiorari should be granted only for compelling reasons. Sup. Ct. R. 10. Petitioner, however, has failed to demonstrate a compelling reason for why this Court should revisit long established case precedence set in *Young v. American Theatres, Inc.*, 427 U.S. 50, 49 L.Ed.2d 310, 96 S.Ct. 2440 (1976) and *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 31, 89 L.Ed.2d 29, 106 S.Ct. 925 (1986) in which this Court established a clear, workable, and fair analysis for determining the constitutionality of adult zoning ordinance under the First Amendment. It is clear from *Young* and *Renton* that this Court

[1] The Court of Appeal calculated that there were at least 15 relocations sites and potentially 24 because one property contained nine separate buildings located on it. *Kozub*, slip op. 9, fn.1.

appreciated the substantial government interest being advanced by local legislatures in passing such zoning ordinances. In order to advance those goals it was necessary to fashion a clear, workable, and fair test to determine First Amendment constitutionality, which would allow cities throughout the United States to effectively address the unique problems facing cities today.

I.

CERTIORARI SHOULD BE DENIED BECAUSE THE CALIFORNIA COURT OF APPEAL DECISION UPHOLDING POMONA'S ADULT ZONING ORDINANCE IS CONSISTENT WITH THIS COURT'S DECISIONS IN *YOUNG* AND *RENTON*

Petitioner argues that lower courts have "gone far beyond" what this Court in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 49 L.Ed.2d 310, 96 S.Ct. 2440 (1976) and *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 31, 89 L.Ed.2d 29, 106 S.Ct. 925 (1986) contemplated by sustaining adult zoning ordinances like Pomona's ordinance because "[t]here are not a 'myriad' of locations . . . ," and it "restrict[s] adult theatres to a tiny portion . . . occupied by long existing, owner occupied manufacturing plants." Petitioner's Brief at p. 17. It is the Petitioner, not the courts that has gone far beyond *Young* and *Renton*.

Petitioner's flawed reading of *Young* and *Renton* asks this Court to now interpret *Renton*'s "reasonable alternative channels" inquiry to compel cities to act as real estate agents for the benefit of adult businesses, which will thereafter attain preferred standing in comparison to other business owners. This Court did not intend such scenario. To the contrary, the Court's express language

states that the "First Amendment requires only that [the city] refrain from effectively denying [an owner] a reasonable opportunity to open and operate an adult theatre within the city. . . ." *Renton*, 475 U.S. at 54.

In so doing, this Court acknowledged the government's legitimate interest in preventing the "secondary effects" caused by the presence of adult businesses in the local neighborhoods throughout this country. *Young*, 427 U.S. at 71; *Renton*, 475 U.S. at 51-53. A city's substantial interest in "preserve[ing] the quality of urban life is one that must be accorded high respect." *Young*, 427 U.S. at 71 (plurality opinion). A city's interest in planning and regulating the use of property in its jurisdiction is a reasonable and adequate purpose and a city must be accorded a reasonable opportunity to experiment with solutions to an admittedly serious problem. *Id.* at 61, 71.

A.

The California Court of Appeal's Holding that 24 Potential Relocation Sites Provides Reasonable Alternative Channels of Communication is Proper

The legal framework in this area of constitutional law was developed by this Court in the seminal cases of *Young* and *Renton*. In *Young*, the plurality Court upheld the constitutionality of a Detroit ordinance that placed a distance restriction on adult theatres requiring they be at least 1,000 feet from one another. *Young*, 427 U.S. at 54. The Court ultimately held that local government may place reasonable restrictions on the number and location of adult businesses. *Id.* at 72-73. Later, in *Renton* this Court determined that such adult zoning ordinances were properly analyzed as a content neutral time, place, and

manner restriction. *Renton*, 475 U.S. at 46-47. There, theater owners challenged a Renton, Washington city zoning ordinance prohibiting adult movie theaters from locating within 1,000 feet of residential property, churches, parks, or schools. *Id.* at 44.

The *Renton* Court applied a two prong test for analyzing a content neutral zoning ordinance. First, the Court asked whether the regulation was designed to serve a substantial government interest. *Id.* at 50. The second inquiry was whether the zoning ordinance allowed for reasonable alternative channels of communication. *Id.*

The reasonable alternative channels of communications inquiry is a question of fact to be determined by a careful case-by-case analysis of the totality of the circumstances. *See Renton*, 475 U.S. at 53-54; *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1525, 1529-31 (9th Cir. 1993); *Young v. City of Simi Valley*, 216 F.3d 807, 821 (9th Cir. 2000). The *Renton* Court listed numerous factors which it found constitutionally relevant to the constitutional inquiry such as the total acreage of land open for use for adult businesses following the enactment of the zoning ordinance; whether the land consisted of accessible real estate; the general stages of development of the land; and whether the real estate was "industrial, warehouse, office, and shopping space" with access to freeways, highways, and roads. *Id.* at 53.

The *Renton* Court also outlined numerous constitutionally ***irrelevant*** factors when determining whether a city's zoning ordinance affords an adult business reasonable alternative channels of communication. *Id.* at 53. The Court listed several factors as irrelevant such as the fact that land was already occupied by existing businesses; the

fact that land was not for sale or for lease; and the location's commercial viability were all deemed irrelevant to the reasonability determination. *Id.* at 54. A First Amendment violation does not occur by the mere fact "[t]hat respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees . . . ," and a city is not required to "ensure that adult theaters . . . will be able to obtain sites at bargain prices. . . . " *Id.*

The evidence of demand is another important factor to be compared with supply in determining the sufficiency of relocation sites in the city. *Isbell v. City of San Diego*, 258 F.3d 1108, 1114 (9th Cir. 2001). Evidence of demand can clearly be inferred from the number of existing adult businesses in the city. *See id.* at 1114-15 (inferring a demand for at least 46 sites arising from the operators of the 45 existing sites along with the plaintiff). In the case *Young v. City of Simi Valley*, Justice O'Scannlain, concurring in part and dissenting in part, observed that the supply and demand test was a "sensible workable test for conducting what might otherwise be an unwieldy inquiry." *Young*, 216 F.3d at 825.

With these principles in mind, the California Court of Appeal made a careful fact specific inquiry into the circumstances in this case as required by the *Young* and *Renton* decisions. On the record before the Court of Appeal, it was clear that Pomona established a far greater supply of available sites (24) when compared to the demand for adult businesses within the city. At the time the ordinance was enacted, there was only one other adult business in addition to Petitioners operating in the City. Petitioner was not forced to compete with other adult businesses following the passage of Pomona's ordinance.

Rather, Petitioner may choose from any one of 24 potential sites. Moreover, there is no evidence that the number of existing businesses within the city have declined since the adoption of the city's adult zoning ordinance, so that the zoning ordinance would have had a "chilling effect" on adult businesses. Justice O'Scannlain opined in *Young*, that it is difficult "to see how an individual can claim he has been denied a reasonable opportunity to open an adult business as long as there exists a site within the municipality available for his business." *Young*, at 825 (O'Scannlain, J., concurring in part and dissenting in part). Petitioner has been given a choice of 24 existing sites within the City of Pomona. As such, the Court of Appeal's decision comports with the law established in *Young* and *Renton* because the city provided Petitioner with a reasonable opportunity to open and operate his adult business.

B.

An Adult Zoning Ordinance That Restricts Adult Businesses to Two Different Industrially Zoned Areas is Consistent With *Young* and *Renton*

Petitioner's argument that Pomona's ordinance does not provide reasonable alternative channels of communication because adult businesses are restricted to light and general industrial zones is not supported by law. The zone in which adult businesses are restricted to is not relevant so long as the business owner is not effectively denied a reasonable opportunity to open and operate the business within the city, *Renton*, 475 U.S. at 54, because there is no constitutional right to locate one's business within a certain commercial zone. *3570 East Foothill Blvd., Inc., v. City of Pasadena*, 912 F.Supp. 1257, 1262 (C.D. Cal. 1995).

As long as reasonable relocation sites are provided somewhere in the municipality, denying an adult business the opportunity to locate in its preferred commercial zone is "not a harm that the Constitution will recognize nor remedy." *Id.* at 1262.

This Court has expressly recognized that cities "must be allowed a reasonable opportunity to experiment with solutions to [the] admittedly serious problems" associated with adult businesses. *Young*, 427 U.S. at 71. Furthermore, this Court has repeatedly upheld the method chosen by cities to regulate adult businesses, as for example, "dispersing them . . . or by effectively concentrating them." *Renton*, 475 U.S. at 52. So long as a city allows for some reasonable relocation sites, the method chosen by the city to further its substantial interests cannot be limited to one method. *Id.* In other words, a city is not prohibited by the First Amendment from enacting a zoning scheme, which effectively concentrates adult businesses within its two industrial zones. *See id.*; *Town of Islip v. Caviglia*, 540 N.E.2d 215, 218-20, 225-26 (N.Y. 1989) (upholding city's zoning scheme that concentrated adult businesses to an industrial district and imposed a one-half mile distance restriction between such businesses).

Petitioner's assertion that *Topanga Press, Inc. v. City of Los Angeles*, footnote 5 "left open" for further clarification the issue of the First Amendment reasonableness of a zoning ordinance that restricts adult businesses to industrial zones is wrong and misses the underlying reasoning applied by the *Topanga* court. 989 F.2d 1524, 1531 (9th Cir. 1993). Had the *Topanga* Court decided to "leave open the question" as to whether a reasonable opportunity to relocate exists when adult businesses are only allowed in industrial zones, it would not have gone through the

trouble of reviewing the case law for "clues as to what sort of land and/or structures reasonably ***may*** be said to comprise the relevant real estate market." *Id.* at 1530 (emphasis added).

After examining the findings of those cases, the *Topanga* court determined that "[t]he courts' findings in these cases lead us to hold that a particular relocation site ***may*** be considered part of the relevant real estate market when the following conditions are met." *Id.* at 1530-31 (emphasis added). The court went on to list the widely cited five factors for determining the physical and legal availability. They include: (1) whether there is a "genuine possibility" that the site will actually become available; (2) with respect to "***relocation sites which are within manufacturing or industrial zones***," if the site is reasonably accessible to the general public; (3) with respect to "areas in manufacturing zones," if the site has proper infrastructure, including sidewalks, road access and lighting; (4) if the site is fit for some "generic commercial enterprise," although not every enterprise; and (5) if the site is commercially zoned, it is *obviously* part of the actual market. *Id.* at 1531-32 (emphasis added). Clearly, with respect to condition number 2 and 3, the *Topanga* court fully believed that manufacturing or industrial zones could, in of themselves, constitute part of the relevant real estate market.

In this instant case, there is no dispute that Pomona tendered sufficient relocation sites. Pomona proffered 24 possible relocation sites within its light and general industrial zones, all of which are reasonably accessible to the general public. As a result, setting all other factors aside, the fact that the city concentrates adult businesses within its two industrial zones is "not a harm that

the Constitution will recognize nor remedy," *3570 East Foothill Blvd.*, 912 F.Supp. at 1262, because the City provided petitioner with a reasonable opportunity to relocate and operate within the city as required by *Young* and *Renton*.

CONCLUSION

For the reasons set forth above, it is clear that Petitioner has failed to demonstrate a compelling reason for why this court should grant Petitioner's Writ. Thus, Respondents request that the Petition for a Writ of Certiorari filed by Petitioner be denied.

Respectfully submitted,

ARNOLD ALVAREZ-GLASMAN,
City Attorney
*ROGER C. COLVIN,
Assistant City Attorney
ALVAREZ-GLASMAN & COLVIN
Attorneys for Respondent, City of Pomona
100 North Barranca Ave., Suite 1050
West Covina, CA 91791
Telephone: (626) 858-9121
Facsimile: (626) 858-2279

**Counsel of Record*